Asia Commercial Finance (M) Bhd & Anor v Development & Realtor Sdn Bhd

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24(31)–695–86
EDGAR JOSEPH JR J
28 FEBRUARY 1992

Land Law *— Charge — Chargee's duty to chargor — Whether chargee was under duty to take reasonable care to sell land at true market value at date of public auction — Whether sale of land at gross undervalue indicated fraud or want of proper care by chargee*

Land Law *— Caveat — Wrongful entry — Whether registered proprietor of land was entitled to enter private caveat over his own land — National Land Code 1965 s 323(1)(a)*

Land Law *— Order for sale — Search of register document of title — Whether intending bidder should make preliminary search before sale by public auction — Whether bidder should make final search after successful bid but before payment of balance of purchase price*

The chargee obtained an order for sale of the chargor's land in January 1988. In July 1989 the senior assistant registrar ('the SAR') fixed the reserve price for the sale of the land by public auction at $140,000 based on a valuation report dated 3 May 1988 which estimated the open market value of the land to be $140,000. Neither the chargor nor his counsel were present when the reserve price was fixed although they were duly served. The chargor appealed against the SAR's decision in fixing the reserve price ('the appeal') but they omitted to apply for a stay of execution of the sale by public auction. On 12 July 1989 the sale by public auction proceeded and after 11 bids, the land was sold to Ooi Chooi Lye ('Ooi') at a price of $140,000. Ooi subsequently nominated the applicant as the purchaser. The chargor entered a private caveat in respect of the land on 11 August 1989. The appeal was allowed on 5 October 1989 and the High Court set aside the public auction ('the order'). The chargee in compliance with the order, rejected the applicant's payment of the balance of the purchase price and refunded to him the deposit of the purchase price. The applicant applied to set aside the order on the ground that the appeal was heard without notice to him ('the application'). The application was heard together with the chargee's fresh summons for directions to fix, inter alia, a new reserve price and a new public auction date. The chargor firstly argued that the order had the effect of setting aside the order of sale obtained under s 256(1) of the National Land Code 1965 ('the Code'). The chargor also alleged that Ooi had been served with a letter informing him of the date of hearing of the appeal ('the letter'). The chargor further argued that in any event the fact that the chargor had lodged a caveat meant that the

A applicant was deemed to know of the appeal and its date of hearing because the applicant could have discovered the caveat by making a search of the register document of title before completing the sale by paying the balance of the purchase price. The chargor finally argued that the sale was at a gross undervalue because firstly a fresh valuation report ought to have been obtained by the chargee not more than three months before the public auction on 12 July 1989 and secondly, the chargor's valuers had estimated the open market value of the land to be $310,000 even if development plans were not approved.

Held, allowing the application:

(1) There was no infirmity in the order for sale. Nor was there any suggestion that the chargee's power of sale had not arisen because there had been no default by the chargor under the charge.

(2) The onus of proving that Ooi had notice of the hearing of the appeal was on the chargor. There was no evidence that the letter had been sent to Ooi and even if there was such evidence, 'sending' was not the same as 'serving'. The chargor had therefore failed to discharge the onus of proving service of the notice of appeal on Ooi.

(3) A registered proprietor of land is not entitled to enter a private caveat in respect of his own land.

(4) In a statutory sale by public auction pursuant to an order for sale under s 256(3) of the Code, it is necessary for an intending bidder to make preliminary searches of the register document of title just before the public auction to comply with the standard of prudence required of him. It is, however, not necessary for an intending bidder to conduct final searches of the register document of title just before completion of the sale because the bidder is entitled to rely on the fact that the sale is conducted under the supervision of an officer of the court. Accordingly the chargor's caveat did not constitute notice of the appeal to the applicant.

(5) A chargee in exercising the power to sell under the Code owes a duty to a chargor to take reasonable care to obtain the true market value of the land at the date of the sale. Such a duty flows from equity's recognition that a chargor has an interest in the surplus, if any, arising from the sale. A sale at an undervalue is not automatically set aside but the undervalue may be so gross as to indicate fraud or want of proper care.

(6) In this case the valuation reports in respect of the land did not express any opinion on the basis of a statutory sale by public auction. Ooi's bid was one of 11 whereby free market forces were at work. The sale was also made pursuant to an order made in a charge action and was not a private sale. Accordingly the court was not prepared to hold that the sale in this case was at such an undervalue as to indicate fraud or want of proper standards of care so as to justify the sale being set aside.

(7) The chargor's remedy, if any, should be confined to a claim in damages against the chargee.
(8) Since the applicant was denied the opportunity of being heard at the appeal, he was entitled to succeed in his application to reinstate the sale by public auction held on 12 July 1989 and to complete the sale by paying the balance of the purchase price to the chargee.

[Bahasa Malaysia summary

Pemegang gadaian telah memperoleh suatu perintah penjualan tanah penggadai pada Januari 1988. Pada Julai 1989 penolong kanan pendaftar ('PKP') telah menetapkan harga rizab bagi penjualan tanah itu melalui lelong awam pada $140,000 berasaskan suatu laporan penilaian bertarikh 3 Mei 1988 yang menganggarkan nilai pasaran terbuka tanah itu pada $140,000. Penggadai dan juga peguamnya tidak hadir pada masa harga rizab itu ditetapkan walaupun mereka telah disampaikan notis seperti yang sepatutnya. Penggadai merayu terhadap keputusan PKP itu menetapkan harga rizab itu ('rayuan itu') tetapi mereka terlupa memohon penggantungan pelaksanaan penjualan melalui lelong awam itu. Pada 12 Julai 1989 penjualan melalui lelong awam itu telah dijalankan dan selepas 11 tawaran, tanah itu telah dijual kepada Ooi Chooi Lye ('Ooi') pada harga $140,600. Ooi kemudiannya menamakan pemohon sebagai pembeli. Penggadai memasukkan suatu kaveat persendirian berkenaan dengan tanah itu pada 11 Ogos 1989. Rayuan itu telah dibenarkan pada 5 Oktober 1989 dan Mahkamah Tinggi telah mengetepikan lelong awam itu ('perintah itu'). Pemegang gadaian, dalam mematuhi perintah itu, telah menolak pembayaran baki harga pembelian itu oleh pemohon dan membayar kembali kepadanya wang cengkeram bagi harga pembelian itu. Pemohon telah memohon untuk mengetepikan perintah itu atas alasan bahawa rayuan itu telah didengar tanpa notis kepadanya ('permohonan itu'). Permohonan itu telah didengar bersama dengan saman baru pemegang gadaian untuk arahan untuk menetapkan, antara lain, harga rizab baru dan tarikh lelong awam baru. Penggadai pertamanya berhujah bahawa perintah itu mempunyai kesan mengetepikan perintah penjualan yang diperolehi di bawah s 256(1) Kanun Tanah Negara 1965 ('Kanun itu'). Penggadai juga mengatakan bahawa Ooi telah disampaikan dengan sepucuk surat memberitahunya tentang tarikh pembicaraan rayuan itu ('surat itu'). Penggadai berhujah selanjutnya bahawa bagaimanapun fakta yang penggadai telah membuat suatu kaveat bermakna bahawa pemohon dianggap tahu akan rayuan itu dan tarikh pembicaraannya kerana pemohon boleh mendapat tahu tentang kaveat itu dengan memeriksa dokumen hakmilik daftaran sebelum menyelesaikan penjualan itu dengan membayar baki harga pembelian itu. Penggadai akhirnya berhujah bahawa penjualan itu adalah pada nilai yang terlampau rendah kerana pertamanya suatu laporan penilaian baru sepatutnya diperolehi oleh pemegang gadaian

tidak lebih daripada tiga bulan sebelum lelong awam pada 12 Julai 1989 dan keduanya, penilai penggadai telah menganggarkan nilai pasaran terbuka tanah itu pada $310,000 walaupun pelan pembangunan tidak diizinkan.

Diputuskan, membenarkan permohonan itu:

(1) Tidak ada kecacatan dalam perintah penjualan itu. Juga tidak ada sebarang saranan yang kuasa penjualan pemegang gadaian tidak timbul kerana tidak terdapat keingkaran oleh penggadai di bawah gadaian itu.

(2) Beban membuktikan yang Ooi mempunyai notis tentang pembicaraan rayuan itu adalah pada penggadai. Tidak terdapat keterangan bahawa surat itu telah dihantarkan kepada Ooi dan walaupun ada keterangan seperti itu, 'menghantar' tidak sama seperti 'menyampaikan'. Penggadai telah oleh itu gagal melaksanakan beban membuktikan penyampaian notis rayuan itu atas Ooi.

(3) Seorang tuan punya tanah berdaftar tidak berhak memasukkan suatu kaveat persendirian berkenaan dengan tanahnya sendiri.

(4) Dalam suatu penjualan statutori melalui lelong awam mengikut perintah penjualan di bawah s 256(3) Kanun itu, adalah perlu bagi seseorang yang berniat untuk membuat tawaran untuk membuat pemeriksaan permulaan dokumen hakmilik daftaran sebelum sahaja lelong awam itu dijalankan untuk mematuhi taraf hemat yang dikehendaki daripadanya. Akan tetapi, adalah tidak perlu bagi seseorang yang berniat untuk membuat tawaran untuk menjalankan pemeriksaan akhir dokumen hakmilik daftaran sebelum sahaja penyelesaian penjualan itu kerana orang yang membuat tawaran itu berhak bergantung kepada fakta yang penjualan itu dijalankan di bawah pengawasan seorang pegawai mahkamah. Oleh kerana itu kaveat penggadai tidak menjadi notis rayuan itu kepada pemohon.

(5) Seseorang pemegang gadaian dalam menggunakan kuasa penjualan di bawah Kanun itu bertanggungjawab kepada seseorang penggadai untuk menggunakan kecermatan yang berpatutan untuk memperoleh nilai pasaran yang sebenarnya tanah itu pada tarikh penjualan itu. Tanggungjawab seperti itu berpunca daripada pengiktirafan ekuiti yang seorang penggadai mempunyai kepentingan dalam baki, jika ada, yang timbul daripada penjualan itu. Suatu penjualan pada nilai yang lebih rendah dari yang sebenarnya tidak secara automatik diketepikan tetapi nilai itu mungkin begitu rendah sekali sehingga menunjukkan fraud atau ketiadaan kecermatan yang berpatutan.

(6) Di dalam kes ini laporan penilaian berkenaan dengan tanah itu tidak melafazkan sebarang pendapat berasaskan suatu penjualan statutori melalui lelong awam. Tawaran Ooi ialah satu daripada sebelas tawaran di mana kuasa pasaran bebas sedang bertindak. Penjualan itu juga dibuat mengikuat perintah dalam suatu tindakan gadaian dan bukan suatu penjualan persendirian. Oleh kerana itu

mahkamah tidak bersedia untuk memutuskan yang penjualan di dalam kes ini adalah pada nilai yang begitu rendah sekali sehingga menunjukkan fraud atau ketiadaan kecermatan yang berpatutan supaya dijadikan alasan bagi pengetepian penjualan itu.

(7) Remedi penggadai, jika ada, harus terbatas kepada suatu tuntutan ganti rugi terhadap pemegang gadaian.

(8) Kerana pemohon tidak diberi peluang didengar di rayuan itu, beliau berhak berjaya dalam permohonannya untuk menghidupkan semula penjualan melalui lelong awam itu yang diadakan pada 12 Julai 1989 dan untuk menyelesaikan penjualan itu dengan membayar baki harga pembelian kepada pemegang gadaian.]

[*Editorial Note*: The chargor's appeal to the Supreme Court vide Civil Appeal No 02–15–92 was heard on 29 June 1992 and the court (comprising Harun Hashim, Mohamed Azmi and Gunn Chit Tuan SCJJ) dismissed the appeal.]

Cases referred to

1 *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54; [1983] 1 WLR 1394 (refd)
2 *Barry v Heider* (1914) 19 CLR 197 (not folld)
3 *Sinclair v Hope Investments* [1982] 2 NSWLR 878 (refd)
4 *Re An Application by Haupiri Courts Ltd (No 2)* [1969] NZLR 353 (refd)
5 *Great West Permanent Loan Co v Friesen & Ors* [1952] AC 208 (refd)
6 *Frazer v Walker* [1967] 1 AC 569; [1967] 1 All ER 649; [1967] 2 WLR 411 (refd)
7 *Mir Bros Projects Pty Ltd v 1924 Pty Ltd* [1980] 2 NSWLR 907 (refd)
8 *Eu Finance Bhd v Siland Sdn Bhd (M&J Frozen Food Sdn Bhd, Intervener)* [1989] 1 MLJ 195 (folld)
9 *Hiap Yiak Trading Sdn Bhd & Ors v Hong Soon Seng Sdn Bhd* [1990] 2 MLJ 155 (not folld)
10 *Kennedy v De Trafford* [1897] AC 180 (refd)
11 *Warner v Jacob* (1882) 20 Ch D 220 (not folld)
12 *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676 (not folld)
13 *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 (folld)
14 *Dimmick v Pearce Investments Pty Ltd* (1980) 43 FLR 235 (folld)
15 *Forsyth v Blundell* (1973) 129 CLR 477; (1973) 1 ALR 68 (folld)
16 *Australian and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd* (1978) 52 ALJR 529 (folld)
17 *Davis v Taylor* (1948) SR (NSW) 514 (folld)
18 *Campbell v Campbell* (1916) 21 CLR 308 (folld)
19 *Khoo Cheong Puay v Oversea-Chinese Banking Corporation & Ors* [1935] MLJ 93 (refd)

Legislation referred to
National Land Code 1965 s 323(1)(a)
Real Property Act 1909 (NSW) [Aust] ss 3, 12(1), 57, 72, 74F(2)

Chen Mun Peng (*Chew Tan & Lim*) for the plaintiffs.
Abu Haniffa (*Syarikat Abu Haniffa*) for the first defendant.
Gan Teik Chee (*Gan Teik Chee & Ho*) for the second defendant.

Edgar Joseph Jr J: This case concerns a dispute between a purchaser ('the purchaser') at a sale of immovable property ('the property') by public auction held pursuant to an order for sale made under s 256 of the National Land Code 1965 ('the Code') and a chargor ('the chargor').

The history of the matter which calls for the consideration of the court may be shortly stated thuswise:

On 28 July 1986, the chargee had commenced a charge action by way of the originating summons herein seeking the enforcement of a charge by way of an order for sale of the property, such charge having been created in its favour by the chargor on 6 August 1985.

On 28 January 1988, the court granted the order for sale and made the further orders required under s 256 of the Code, including an order fixing the date of the auction sale, the chargor being absent although duly served.

On 6 July 1988, the chargee filed a summons-in-chambers for a new auction date.

On 16 March 1989, the court in the presence of counsel for the chargor and the chargee, fixed 12 July 1989 as the new auction date, no objection having been raised by counsel for the chargor.

On 3 July 1989, the senior assistant registrar of the High Court fixed the reserve price for the sale by public auction of the property at $140,000; neither the chargor nor his counsel being present although duly served. In fixing the reserve price, the senior assistant registrar relied on a valuation report dated 3 May 1988, by Messrs CH Williams, Talhar & Wong Sdn Bhd wherein the opinion was expressed that the open market value, as at that date, with vacant possession and free from all encumbrances, was $140,000.

On 6 July 1989, Messrs Daud & Partners, solicitors for the chargor filed a notice of appeal against the decision of the senior assistant registrar fixing the reserve price at $140,000 but they omitted to apply for a stay of execution.

On 12 July 1989, pursuant to the order of this court, the sale by public auction proceeded and after 11 bids the property was knocked down to one Ooi Chooi Lye at a price of $140,600 who duly paid the 10% deposit stipulated in the conditions of sale. Completion was to be on 12 October 1989. A certificate of result of sale was signed by the auctioneers appointed by the court, Messrs CH Williams, Talhar & Wong, and a memorandum was annexed thereto signed by the solicitors for the chargee confirming the sale and acknowledging the receipt of the 10% deposit of the purchase price.

On 15 July 1989, Ooi Chooi Lye nominated the purchaser as the buyer and it was not disputed that this nomination related back to the date of the auction.

On 4 August 1989, Messrs Gan Teik Chee & Ho had replaced Messrs Daud & Partners as solicitors for the chargor, and on 4 August 1989, they filed an application for an order of stay of proceedings pending the determination of the appeal against the decision of the senior assistant registrar made on 3 July 1989 fixing the reserve price at $140,000.

On 11 August 1989, the chargor, through his solicitors, Messrs Gan Teik Chee & Ho, had lodged a caveat to prevent any transfer of the property to the purchaser.

It was alleged by the chargor, though subsequently denied by the purchaser, that by a letter dated 17 August 1989, being exh CCK 4 to encl 40, his solicitors Messrs Gan Teik Chee & Ho, had put both the chargee's solicitors and the said Ooi Choon Lye, on notice of the date of hearing of his appeal and advised them of his caveat, a copy of which was annexed.

On 5 October 1989, the chargor's appeal against the decision of the senior assistant registrar fixing the reserve price was heard.

It was pointed out by counsel for the chargor that as the public auction had been held some 14 months after the date of the valuation report dated 3 May 1988 by Messrs CH Williams, Talhar & Wong on the basis of which the senior assistant registrar had fixed the reserve price of the property at $140,000, a fresh valuation report ought to have been obtained by the chargee not more than three months before the auction date in order to determine what the fair market value was. Counsel then went on to refer to a report by the chargor's valuers, Messrs Jones, Lang & Wootton, dated 22 September 1989, wherein the open market value of the property with vacant possession and free from all encumbrances as at 12 July 1989, on the basis that certain development plans were approved was said to be $360,000 and, if not approved, $310,000.

On the other hand, counsel for the chargee drew attention to the great disparity in the opinions as to the fair market value expressed in the two valuation reports aforesaid and added that the chargor had only himself to blame, for, although duly served, neither he nor his solicitors had attended the hearing of the summons-for-directions before the senior assistant registrar when the reserve price had been fixed at $140,000.

In the event, the appeal was allowed; the court set aside the auction sale and directed that a fresh application for directions be made by the chargor to the senior assistant registrar to fix a new auction date for the property at a new reserve price. There were also consequential orders that the chargor was to bear all costs and expenses incurred by the chargee by reason of the public auction which had been held on 12 July 1989. In consequence, the chargor's application for a stay of proceedings was not proceeded with.

On 10 October 1989, by a letter dated the same date and addressed to the solicitors for the chargee, the purchaser had tendered the balance of the purchase price but the tender was rejected by them upon the ground that the auction sale had been set aside by the court on 5 October 1989. The solicitors for the chargee, apart from returning the purchaser's cheques

representing the balance purchase price, also refunded the 10% deposit purchase price.

On 17 November 1989, the purchaser applied for leave to intervene and to be added as a party to these proceedings and to set aside the order made by this court on 5 October 1989 setting aside the auction sale held on 12 July 1989.

On 8 March 1990, the chargee filed a fresh summons-for-directions before the senior assistant registrar to fix a new reserve price and a new auction date. However, this application had been adjourned pending the decision on the purchaser's application to reinstate the sale by public auction held on 12 July 1989.

On 11 June 1990, the court, after hearing counsel for the purchaser, the chargor and the chargee, granted the purchaser's application for leave to intervene and to be added as a party.

I then heard the purchaser's application to set aside the order of this court dated 5 October 1989 allowing the chargor's appeal and, in effect, seeking to reinstate the sale by public auction held on 12 July 1989.

Those being the facts, I must now proceed to examine the legal position and then to state my conclusions.

Although the chargee has only a statutory charge and is not the registered proprietor of the land which he purports to transfer, he may do so by reason of the provisions of the Code provided he complies with the conditions laid down therein. Once those conditions are complied with and completion has duly taken place the proper registering authority is obliged by s 259(3)(a) of the Code to register the certificate of sale and the sale is as valid and effective as if it had been carried out by the registered proprietor/chargor. If, on the other hand, the statutory conditions have not been complied with the chargee has neither the right nor the power to sell the land and if he purports to do so any certificate of sale issued pursuant thereto would be void and of no effect but if the proper registering authority registers such a certificate of sale, a bona fide purchaser for value without notice would take a good title.

There is, however, no suggestion here that the chargee had no power to sell by reason of non-compliance with the statutory conditions. But, the point taken is that the sale was not properly conducted because it was at a gross undervalue, thereby implying negligence on the part of the chargee, although it is not suggested that the purchaser had any hand in a party to the undervaluation. On this ground therefore it was said that the sale to the purchaser should be set aside.

It is indisputable that at a sale by public auction a contract comes into being when the hammer falls. In the present case, it was accepted on all sides that there had been not only a contract but a completed contract of sale for the purchaser had tendered the balance purchase price within the time limited under the conditions of sale but, as already noted, the same was rejected by the solicitors for the chargee for the reasons stated.

So, in the three stages of a sale transaction, namely, contract, completion and registration, I am here concerned with the second stage. I am also concerned with a case where the chargor accepts that although there had

been due compliance by the chargee with the statutory conditions for a sale laid down in the Code and it had exercised a legitimate power of sale, he contends that the power had been exercised improperly because the sale was at a gross undervalue.

First of all, I must correct a misconception on the part of counsel for the chargor. He had submitted that when on 5 October 1989 the court had allowed the appeal of the chargor against the decision of the senior assistant registrar dated 3 July 1989 fixing the reserve price for the sale by public auction at $140,000 and had directed the senior assistant registrar to fix a fresh reserve price, the effect of allowing the appeal was to result in the order for sale under s 256(1) of the Code being set aside. That submission is, of course, quite untenable. There is no infirmity in the order for sale. None was even alleged. There was no suggestion that the chargee's power of sale had not arisen because there had been no default by the chargor under the charge which would go to the core of the chargee's claim or that there had been non-compliance with the notice requirements of the Code.

It was contended by counsel for the purchaser that the sale by public auction held on 12 July 1989 was held according to the requirements of the Code, uninhibited by any caveat, injunction or order for stay.

It was further contended that the chargor's appeal to set aside the sale was heard on 5 October 1989, that is to say, nearly three months after the auction sale, and it was heard without notice to the purchaser. The alleged service of the letter dated 17 August 1989 from the solicitors for the chargor mentioning the date of hearing of the appeal upon Ooi Choon Lye, the successful bidder whose nominee the purchaser was, was challenged. In his affidavit affirmed on 2 February 1990, Ung Beng Khoon, the managing director of the purchaser had in para 4 said this: 'We do not know if notice was served on Ooi Choon Lye. There is no proof of such notice'. It was therefore said that as no proof of service had been adduced by the chargor, it had to be assumed that there had been no service on Ooi Choon Lye, and so the purchaser had been denied the opportunity of being heard with the result that the order of this court dated 5 October 1989 allowing the chargor's appeal had to be set aside ex debito justitiae irrespective of the merits.

It was also contended that the purchaser had bought the property in good faith at a public auction supervised by the senior assistant registrar, an officer of the High Court and that any loss suffered by the chargor could be compensated for by an award of damages as illustrated by the Privy Council case of *Tse Kwong Lam v Wong Chit Sen.*[1]

In reply, counsel for the chargor contended that the affidavit of Chiew Chee Kin, the managing director of the chargor, dated 9 January 1990, being encl 40, showed that Ooi Choon Lye had been informed of the date of hearing of the chargor's appeal by the chargor's solicitors' letter dated 17 August 1989.

In addition, it was said that the chargor had lodged a caveat supported by the usual statutory declaration which mentioned the chargor's appeal and its date of hearing. This, it was said, was notice to the whole world and although the caveat had been lodged about one month *after* the auction sale

was held this was before the completion date, so that the purchaser could have discovered that there was an appeal by the chargor pending and the date thereof. In the circumstances, the purchaser must be deemed to have had notice of the hearing of the appeal by the chargor and so was bound by any order made in that appeal.

In my view, the onus of proving that Ooi Choon Lye had notice of the hearing of the chargor's appeal was upon the chargor. The affidavit of the managing director of the chargor, Chiew Chee Kin, merely *assumes* that Ooi Choon Lye had been informed of the date of hearing of the appeal, for he had no personal knowledge of that fact. The basis of that assumption was the letter of the chargor's solicitors dated 17 August 1989.

A perusal of that letter does not suggest that it was sent by registered post or was delivered by hand. Indeed, there is nothing in it to even show that it had been sent by ordinary post and even if it had been, *sending* is not the same as *serving*. Chiew Chee Kin was evidently relying on what his solicitors had told him regarding the letter of 17 August 1989, so, as I have said, he had no personal knowledge as to whether or not Ooi Choon Lye had been informed of the date of hearing of the appeal. His statement on the question of service was hearsay. In view of the challenge mounted by the purchaser on the question of service, I would say that there was no proof that the notice had been served upon Ooi Choon Lye, and so the chargor had failed to discharge the onus which lay upon him of proving such service.

The next point to consider in the context of the submission of counsel for the chargor was whether or not the fact that the chargor had lodged a caveat about one month after the sale by public auction but before the date of completion meant that the purchaser was deemed to know of the appeal and its date of hearing.

Before I proceed to consider this point, it occurred to me that it might be open to question whether a registered proprietor of land could caveat his own land.

In New South Wales, Australia, in practice the registered proprietor is regarded as competent to lodge a caveat against his own land. In *Barry v Heider*,[2] a High Court decision, on appeal from the Supreme Court of New South Wales, the plaintiff claimed that he had been induced by fraud to sign a transfer and lodged a caveat to forbid registration of that transfer. The High Court made no adverse comment on that procedure, which is now given statutory force by s 74F(2) of the Real Property Act 1909.

Sinclair v Hope Investments[3] — also a New South Wales case — is authority for the proposition that a mortgagor has a caveatable interest where the mortgagee had entered into a contract in breach of the duty in exercising the power of sale. It was an equitable interest sufficient to found a caveat under the relevant legislation.

In *Re An Application by Haupiri Courts Ltd (No 2)*[4] — a New Zealand case — Richmond J held that a registered proprietor cannot base a caveat against dealings with the land of which he is registered as proprietor solely upon the ground of his registered ownership, but must establish some set of circumstances which give rise to an interest in the land distinguishable from that which he holds as registered proprietor: 'In such circumstances it would

seem that the fact that he is the registered proprietor of an estate or interest under the Act may not prevent him lodging a caveat' (at p 357). His Honour considered that the then New South Wales Act s 72 was more apt to confer the right to caveat upon a registered proprietor than the language of the New Zealand counterpart, but it would appear that the use in the New Zealand Act of the phrase 'otherwise howsoever' should have led to an opposite result. In holding that in New Zealand the registered proprietor must prove some 'distinct interest' in the land on which to base a caveat, he cited the example of an unpaid vendor: *Great West Permanent Loan Co v Friesen & Ors*:[5]

> This was an unregistered transaction which give rise to a distinct beneficial interest in the registered proprietors as unpaid vendors and [at p 216] Sir Adrian Knox, in delivering the judgment of their Lordships, adverted to the fact that caveats could have been lodged to protect the interest of the registered proprietor.

The above judgment of Richmond J left unresolved the question of what a 'distinct interest' sufficient to support a caveat by a registered proprietor against his own land is. The position is now governed by s 74F(2), and a caveat may quite properly be lodged by a registered proprietor where his indefeasibility of title is threatened by the possibility of registration of some unauthorized dealing. Certainly, circumstances such as suspected theft of a certificate of title, can, and do, arise, making it expedient for the registered proprietor, by lodging a caveat, to prevent registration of any forged dealing which could deprive him of his land: *Frazer v Walker*.[6] However, in such circumstances, it is also proper to request the Registrar-General to record his own caveat under the provisions of s 12(1) of the RP Act, to eliminate the possibility of a forged withdrawal of caveat.

In *Mir Bros Projects Pty Ltd v 1924 Pty Ltd*[7] — another New South Wales case — a caveat claimed an 'estate or interest as registered proprietor', and Powell J expressed no concluded opinion on the question. His Honour pointed out that, whilst there was a definition of 'proprietor' in s 3 of the RP Act, there was no definition of 'registered proprietor', and said at p 922:

> I would not wish it to be thought that, by not dealing with the matter, I necessarily assent to the view that to claim an 'estate or interest as registered proprietor' is, for the purposes of s 72, a sufficient statement of the estate or interest claimed by a caveator.

However, his Honour held that a caveat by a mortgagor seeking to prevent the registration of any dealing affecting the land went far beyond what it might legitimately claim was necessary to protect such rights as, for example, those conferred on a mortgagor by s 57 of the Act, and was improperly lodged.

Nearer home, the position in the country is regulated by s 323(1)(a) of the Code which says:

> The persons and bodies at whose instance a private caveat may be entered are —
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;

There are two conflicting decisions of the High Court which dealt with the point; namely, *Eu Finance Bhd v Siland Sdn Bhd (M&J Frozen Food Sdn Bhd, Intervener)*[8] where LC Vohrah J held at p 196 that a registered proprietor, merely as registered proprietor, was not entitled to caveat his own land. In the words of the learned judge:

> I do not think Siland [ie the defendant] can successfully bring itself within this first limb in the light of its plain meaning because in my view a person who relies on his status as registered owner must necessarily be a person already possessing title or interest in the land and not merely a person claiming title to or any interest in that land and must as a matter of logic have been excluded by the language of s 323(1).

The opposite opinion was expressed by Richard Talalla JC (as he then was) in *Hiap Yiak Trading Sdn Bhd & Ors v Hong Soon Seng Sdn Bhd.*[9]

The opinion of Richard Talalla JC has come under heavy criticism by Mr Teo Keang Sood in his well researched article 'Caveating One's Own Land: Cold Comfort for the Registered Proprietor' [1991] 1 MLJ xxxiv.

With respect, I would express a preference for the opinion expressed by LC Vohrah J for the cogent reasons given by Mr Teo Keang Sood.

The next point to consider is whether, having made a search of the register document of title just before the auction sale was held and the 10% deposit of the purchase price paid, it was necessary for the purchaser to have made a second search just before completion because had he done so he would have discovered that there was the appeal by the chargor against the decision of the senior assistant registrar pending in this court and the date of hearing thereof.

Generally, certain searches must be made by a purchaser in order to comply with the standard of prudence required of purchasers if they are to be unaffected by notice. In practice, there are two series of searches to be made: the preliminary searches and the final searches. The preliminary searches are made before the purchaser enters into a legally binding contract with the vendor. In ordinary sale and purchase transactions, as opposed to statutory sale by public auction, preliminary searches should be made in time for requisitions arising therefrom to be made within the time limited by the contract of sale. Final searches are searches made as shortly before completion as possible, preferably on the day of completion itself or better still within an hour of completion, their purpose being to uncover some flaw in title which has arisen since the preliminary searches and the making of the requisitions on title.

In the case of a statutory sale by public auction held pursuant to an order for sale under s 256(3) of the Code the preliminary searches by an intending bidder would be necessary to comply with the standard of prudence required of him; the discovery at that stage of a flaw in the title would spare him the expense and trouble in attending and participating in the bidding exercise at the public auction. However, I am not at all sure whether it would be necessary for an intending bidder to conduct the final searches, because it could be said that he was entitled to rely on the fact that the sale was being conducted under the supervision of an officer of the court. He

would have no reason to suppose that such a search would be necessary. In other words, I do not consider that the purported lodging of the caveat in this case constituted notice to the purchaser of the chargor's appeal. The purchaser in my view was entitled to actual notice of the appeal. A

But, what is more to the point, having regard to the issues which arise for decision upon this application, what is the remedy to which the chargor is entitled assuming he is correct in his contentions that the sale was at a gross undervalue? B

Since reserving judgment I have uncovered certain authorities which I have found to be of considerable assistance on this point. The cases referred to involve mortgagees but no doubt the same principles apply in the case of chargees. C

It is settled law that a chargee in exercising the power to sell under the Code owes a duty to a chargor which flows from equity's recognition that a chargor has an interest in the surplus (if any) arising from the sale.

The issue of the appropriate standard of care owed by the chargee to the chargor is not free from difficulty. One line of authority is to the effect that a mortgagee's only duty is to act bona fide in the conduct of the sale (see *Kennedy v De Trafford*;[10] *Warner v Jacob*[11]). In the latter case, Kay J said at p 224: D

> ... a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud. E

In the Australian case of *Pendlebury v Colonial Mutual Life Assurance Society Ltd*[12] Isaacs J stated at p 699 that 'so long as [the mortgagee] observed specified formalities and acts in good faith his conduct cannot be challenged'. F

The opposite line of authority is exemplified by the English Court of Appeal case of *Cuckmere Brick Co Ltd v Mutual Finance Ltd*[13] where Salmon LJ based the obligation of the mortgagee, not on a standard of behaviour imposed by equity but on a legal duty based on the tort of negligence and stemming from the proximity of the mortgagor and the mortgagee. What his Lordship said was this: G

> Surely they are 'neighbours'. Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale. H

In Australia, the controversy as to which test is the appropriate test to apply — the more stringent test laid down in *Cuckmere*[13] setting a higher standard for the mortgagee or the more relaxed test laid down in *Pendlebury*[12] — remains to be resolved by the High Court.

I note, however, that in the Hong Kong Privy Council case of *Tse Kwong Lam v Wong Chit Sen*[1] their Lordships accepted the *Cuckmere* test. I would respectfully do the same. I

A On the merits of the sale, matters which require scrutiny by the court are the organization of the sale, and in particular the price received (*Dimmick v Pearce Investments Pty Ltd*[14]); the extent and content of advertising (*Pendlebury*[12] and *Cuckmere*[13]); the extent of the mortgagee's attention to potential purchasers, possible competition between actual purchasers and potential purchasers (*Forsyth v Blundell*[15]); and the relationship if any, between the mortgagee and the purchaser (see *Australian and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd*[16]).

B

There is authority for saying that a sale at an undervalue is not automatically set aside (see *Davis v Taylor*;[17] *Kennedy v De Trafford*[10]). But, the undervalue may be so gross as to indicate fraud or, at least, want of proper C standards of care (see *Campbell v Campbell*[18]). The case of *Khoo Cheong Puay v Oversea-Chinese Banking Corporation & Ors*[19] shows how difficult it is to have a sale set aside on the ground of undervalue for there Mills J said:

> ... to set aside a sale on the ground of gross undervalue, such undervalue must, at the date of the contract of sale, be sufficiently gross to be itself conclusive and D decisive evidence of fraud.

There is also authority for saying that the concept of market value is relative and depends upon the market in question.

Kelly J in *Dimmick v Pearce*[14] at p 240 drew attention to the fact that the market value for properties at a mortgage sale may not be the same as it E would be for the same properties if they were sold privately in the following terms:

> The vendor willing to sell for a fair price but not desirous to sell ... is hardly the equivalent of a mortgagee exercising a power of sale concerned, within the limits applicable, for his own interests only nor ... is a purchaser at such an auction necessarily to be equated with the ordinary purchaser willing to purchase.

F

Upon the facts in the present case, although it is true that there is a wide disparity in the opinion evidence of the rival experts as to the true market value of the property at the time of the auction sale, it is noteworthy that neither expert has expressed his opinion on the basis of a statutory sale by public auction. I am not prepared to hold that the sale if it was at an G undervalue at all, was at such an undervalue as to indicate fraud or want of proper standards of care as to justify the sale being set aside.

Ooi Chooi Lye's bid was one of eleven. Free market forces were at work and this was after all a sale pursuant to an order made in a charge action and not a private sale. Ooi Chooi Lye had no reason to suppose that the price H at which the property was knocked down to him, which was $600 above the reserve price, was anything but a fair market price.

Before me, no attempt was made to attack the organization of the sale nor had fraud of any sort been even alleged. Moreover, the chargor's lack of diligence had been deplorable; he never attended the hearing before the senior assistant registrar when the reserve price was fixed and never ob- I tained a stay after filing his notice of appeal. He offered no satisfactory proof of service of notice of hearing of his appeal upon Ooi Choon Lye whose nominee the purchaser was. He did, however, lodge an invalid

caveat, but that was one month after the auction sale when there was already in being a binding contract of sale and purchase.

In the circumstances, the chargor's remedy (if any) should be confined to a claim sounding in damages, against the chargee. I need hardly add that whether or not he would succeed in this must abide the result of a hearing upon the merits in separate proceedings.

The result therefore is that, being satisfied that the purchaser was denied the opportunity of being heard at the chargor's appeal, the purchaser is entitled to succeed in his application to reinstate the sale by public auction of the property held on 12 July 1989 and I would decree that upon payment of the balance of the purchase price of $131,400 to the chargee or its solicitors within one month from date hereof, there must be orders in terms of 2, 3, 4 and 6 thereof.

Application allowed.

Reported by Wong Kian Kheong